Victim Compensation and Government Claims Board

Persons Erroneously Convicted of Felonies Regulations
RESPONSES TO COMMENTS
November 6, 2009 – December 21, 2009

PROPOSED REG	COMMENTS & PROPOSED REVISIONS	DEPARTMENT RESPONSE
§ 640	Section 640(a) - Claimants must include an original plus one copy of supporting documentation and evidence. This change is needed to make clear that the Board does not require the original plus two copies, but rather the original plus one copy of supporting documentation and evidence.	640(a) - Claimants must include an original and one copy of the following: 1. claim form and, 2. Supporting documentation.
	Section 640(b) - If the Attorney General submits any evidence, it must also submit a copy to Claimant. This change is needed to make clear how many sets of documentation the AG must submit and who is responsible for sending a set to Claimant.	640(b) - If the Attorney General provides any evidence to the Board, it shall also provide a copy to the Claimant.
	Section 640(b) should include a timeframe within which the Attorney General may offer evidence in support of or in opposition to the claim, and provide that any such evidence be provided to the claimant within that timeframe.	California Penal Code sections 4900 through 4906 only require that the claimant submit his or her claim within two years of specific events. Until the Legislature mandates otherwise, no time limit will be imposed on the setting of a hearing date or to place a time constraint on the production of a proposed decision.
	We request a change from "Erroneously Convicted Felon Claim Form" to "Erroneously Convicted Person Claim Form" because many claimants whose convictions have been overturned are no longer felons. The title is therefore inaccurate as to many claimants.	Erroneously Convicted Person will replace Erroneously Convicted Felon on the claim form and in the regulations,

§ 641	Section 641 - A section should be added to require that all communications between the Attorney General and the Board be provided to the claimant in a timely manner, and that the Board conduct a hearing on a Penal Code 4900 claim within a reasonable timeframe (e.g. 120 days) from the submission of the claim.	641 - California Penal Code sections 4900 through 4906 only require that the claimant submit his or her claim within two years of specific events. Until the Legislature mandates otherwise, no time limit will be imposed on the setting of a hearing date or to place a time constraint on the production of a proposed decision.

§ 642	Section 642(a) - Appears to be aimed at establishing that standing alone, the fact that the claimant denies that he/she committed the crime at issue; the judgment was reversed (whether by appeal or post-trial motion); that the claimant was retried for the crime at issue and acquitted, or that the prosecuting authority decided not to retry the claimant for the crime at issue, is not sufficient to establish eligibity under the staute. But as drafted, the section is far broader than that. It could be construed to refer to the underlying proceedings that led to the aforementioned facts, including evidence adduced therein, and in any event requires the claimant to produce substantial independent corroborating evidence of innocence in order to prove eligibility for relief under the statute. What does independent mean in this context? Obviously a claimant's proof of innocence may rely exclusively on evidence introduced in prior proceedings. This section needs to be clarified.	642(a) - In *Tennison v. VCGCB (2007) 152 Cal. App. 4th 1164*, the Court held that even though the district attorney conceded that Tennison was factually innocent of the crime for which he was convicted and incarcerated, Tennison had not met his heavy burden of proof that was required in his claim for compensation from the Board. In other words, even though Tennison had been determined to be factually innocent, the Court determined that he had not provided substantial independent evidence of his innocence. The Court also held that even though the finding of factual innocence was improperly granted in Tennisons' case, had the finding of factual innocence been proper, the doctrine of collateral estoppel was not applicable because such an application would defeat public policy and the fundamental principles underlying the doctrine. . The fact that a claimant has his or her conviction reversed does not equate to a determination that the claimant was erroneously convicted. Thus, the need for additional evidence.
	Section 642(a) - In reaching its determination of the merits of the claim, the Board shall consider claimant's denial of the commission of the crime; reversal of the judgment of conviction on appeal or in another post-conviction proceeding; acquittal of claimant on retrial; or, the decision of the prosecuting authority not to retry claimant for the crime. The changes are needed to reduce Claimant's burden from something that may be impossible and to add the type of evidence the Board may consider in reaching its determination on the merits of the claim. The proposed rule as currently written forces Claimant to provide evidence in excess of that which may have resulted in the overturning of his conviction. Under normal circumstances Claimant's trial or post-conviction attorney will have already	642(a) In reaching its determination of the merits of the claim, claimant's denial of the commission of the crime; reversal of the judgment of conviction; acquittal of claimant on retrial; or, the decision of the prosecuting authority not to retry claimant for the crime, may be considered by the Board but will not be deemed sufficient evidence to warrant the Board's recommendation that claimant be indemnified in the absence of substantial independent corroborating evidence that claimant is innocent of the crime charged. The fact that a conviction was overturned does not satisfy the claimant's heavy burden of proof in a hearing for compensation as an erroneously convicted person. Convictions are overturned for a number of reasons, and

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§ 643	Section 643(c)(4) [new subdivision, requiring renumbering of proposed subdivisions 4-14] - (A pre-hearing conference may address any of the following): subpoenas to be issued by the Board, on a showing of good cause by the requesting party; Claimants need to be able to have witnesses subpoened by the Board in order to secure their attendance at compensation hearings. At present, any witness who chooses not to attend cannot be compelled to do so, which has a deleterious effect on a Claimant's case. We understand that in the past five years the Board has granted no hearing officer permission to issue subpoenas, though the Board has the power to do so. The legislative purpose of the subpoena power, granted to the Board by CCR, tit. 2, sec. 873.6, is to allow Claimants a fair chance to present their case and meet their burden of proof. The suggested regulation would alleviate this problem by establishing a standard under which a Claimant could make use of the Board's power to subpoena witnesses. Claimants need to be able to have witnesses subpoened by the Board in order to secure their attendance at compensation hearings. At present, any witness who chooses not to attend cannot be compelled to do so, which has a deleterious effect on a Claimant's case. We understand that in the past five years the Board has granted no hearing officer permission to issue subpoenas, though the Board has the power to do so. The legislative purpose of the subpoena power, granted to the Board by CCR, tit. 2, sec. 873.6, is to allow Claimants a fair chance to present their case and meet their burden of proof. The suggested regulation would alleviate this problem by establishing a standard under which a Claimant could make use of the Board's power to subpoena witnesses.	643(c)(4) - Gov. Code, section 11450.20(a) states that subpoenas and subpoenas duces tecum shall be issued by the agency or presiding officer at the request of a party, or by the attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure. Gov. Code section 11450.05 states that: (a) This article applies in an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500). (b) An agency may use the subpoena procedure provided in this article in an adjudicative proceeding not required to be conducted under Chapter 5 (commencing with Section 11500), in which case all the provisions of this article apply including, but not limited to, issuance of a subpoena at the request of a party or by the attorney of record for a party under Section 11450.20. However, the Board is exempted from the above provisions by Cal. Admin. Code, Title 2, Section 615.1 that states: (a) The formal hearing provisions of the Administrative Procedure Act (Gov. Code, §§ 11500-11529) do not apply. (b) The alternative dispute procedures of the Administrative Procedure Act (Gov. Code, §§ 11420.10-11420.30) do not apply. (c) The declaratory decision provisions of the Administrative Procedure Act (Gov. Code, §§ 11465.10-11465.70) do not apply. Gov. Code Section 13910 also states that the executive officer, or his or her designee, shall keep a full and true record of all proceedings of the board, issue all necessary process, writs, warrants, and notices, and perform those other duties as the board prescribes. The executive officer and the deputy executive officers, or their designees may

		administer oaths, certify to all official acts, and issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and testimony in any inquiry, investigation, hearing, or proceeding in any part of the state. Since the Board is exempt from the formal provisions of the APA (Gov. Code, §§ 11500-11529), Gov. Code, section 11450.20(a) does not mandate the issuance of subpoenas. Also, a mandate that Board issue subpoenas is ill-advised because the Board lacks the authority to timely enforce an administrative subpoena. Cal. Code Reg., tit. 2, section 618.3 states that the Board or hearing officer may, in regards sanctions for failure to obey a lawful Board order, certify the facts that justify a contempt sanction to the superior court in the county where the hearing is held. The person being sanctioned must be noticed of the action, and only then is the matter scheduled for hearing in the superior court .
§ 644	Section 644 (g) "A party that requests that all or part of a hearing be conducted by electronic means other than telephone under California Code of Regulations section 617.4 ~~shall~~ <u>may</u> be responsible for providing, operating, and paying for all necessary equipment." At present, claimants and the Attorney General are allowed to use a phone provided by the Board for witnesses who testify telephonically. The suggested provision puts the burden on those	644(g) - This section will be revised to incorporate "may" instead of "shall."

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	Section 642(a) - In reaching its determination of the merits of the claim, the Board shall consider claimant's denial of the commission of the crime; reversal of the judgment of conviction on appeal or in another post-conviction proceeding; acquittal of claimant on retrial; or, the decision of the prosecuting authority not to retry claimant for the crime. The changes are needed to reduce Claimant's burden from something that may be impossible and to add the type of evidence the Board may consider in reaching its determination on the merits of the claim. The proposed rule as currently written forces Claimant to provide evidence in excess of that which may have resulted in the overturning of his conviction. Under normal circumstances Claimant's trial or post-conviction attorney will have already	642(a) In reaching its determination of the merits of the claim, claimant's denial of the commission of the crime; reversal of the judgment of conviction; acquittal of claimant on retrial; or, the decision of the prosecuting authority not to retry claimant for the crime, may be considered by the Board but will not be deemed sufficient evidence to warrant the Board's recommendation that claimant be indemnified in the absence of substantial independent corroborating evidence that claimant is innocent of the crime charged. The fact that a conviction was overturned does not satisfy the claimant's heavy burden of proof in a hearing for compensation as an erroneously convicted person. Convictions are overturned for a number of reasons, and

	presented all available exculpatory evidence, making it not only unreasonable but for most Claimants impossible to meet an added requirement of "substantial independent corroborating evidence." Moreover, should a hearing officer be convinced by the same exculpatory evidence that persuaded the court or prosecuting attorney, the hearing officer could not grant the compensation claim regardless of how strong that evidence of innocence in the absence of something further. We do not believe this is the intent of the legislation or the Board. Rewriting the regulation as suggested would avoid these problems; Claimant would not have the sometimes insurmountable burden of presenting evidence that does not exist, i.e., evidence that has not been used in the extensive exoneration proceedings, and the hearing officer would not be forced to seek out further evidence of innocence where he or she is already convinced of Claimant's innocence by the factors listed for consideration. As to the types of evidence the Board can consider, the list of admissible evidence does not include a decision reversing Claimant's conviction in a habeas proceeding. The suggested language would remedy that omission. Section 642(c) should be revised to pertain to relevant evidence of the sort that reasonable persons rely upon, not "responsible persons."	not all equate to a finding that the person was innocent of the crime. See above discussion re Tennison. Also, the fact that a prosecutor chooses not to retry a defendant whose conviction was overturned is not sufficient, by itself, to determine that a claimant has met his or her burden. Modified language above removes "on appeal" and thus allows all subsequent legal proceedings to be considered. 642(c) - The term "responsible" originated in an existing Board regulation, but "reasonable" is more appropriate in the context of these types of hearings

§ 643	Section 643(c)(4) [new subdivision, requiring renumbering of proposed subdivisions 4-14] - (A pre-hearing conference may address any of the following): subpoenas to be issued by the Board, on a showing of good cause by the requesting party; Claimants need to be able to have witnesses subpoened by the Board in order to secure their attendance at compensation hearings. At present, any witness who chooses not to attend cannot be compelled to do so, which has a deleterious effect on a Claimant's case. We understand that in the past five years the Board has granted no hearing officer permission to issue subpoenas, though the Board has the power to do so. The legislative purpose of the subpoena power, granted to the Board by CCR, tit. 2, sec. 873.6, is to allow Claimants a fair chance to present their case and meet their burden of proof. The suggested regulation would alleviate this problem by establishing a standard under which a Claimant could make use of the Board's power to subpoena witnesses. Claimants need to be able to have witnesses subpoened by the Board in order to secure their attendance at compensation hearings. At present, any witness who chooses not to attend cannot be compelled to do so, which has a deleterious effect on a Claimant's case. We understand that in the past five years the Board has granted no hearing officer permission to issue subpoenas, though the Board has the power to do so. The legislative purpose of the subpoena power, granted to the Board by CCR, tit. 2, sec. 873.6, is to allow Claimants a fair chance to present their case and meet their burden of proof. The suggested regulation would alleviate this problem by establishing a standard under which a Claimant could make use of the Board's power to subpoena witnesses.	643(c)(4) - Gov. Code, section 11450.20(a) states that subpoenas and subpoenas duces tecum shall be issued by the agency or presiding officer at the request of a party, or by the attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure. Gov. Code section 11450.05 states that: (a) This article applies in an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500). (b) An agency may use the subpoena procedure provided in this article in an adjudicative proceeding not required to be conducted under Chapter 5 (commencing with Section 11500), in which case all the provisions of this article apply including, but not limited to, issuance of a subpoena at the request of a party or by the attorney of record for a party under Section 11450.20. However, the Board is exempted from the above provisions by Cal. Admin. Code, Title 2, Section 615.1 that states: (a) The formal hearing provisions of the Administrative Procedure Act (Gov. Code, §§ 11500-11529) do not apply. (b) The alternative dispute procedures of the Administrative Procedure Act (Gov. Code, §§ 11420.10-11420.30) do not apply. (c) The declaratory decision provisions of the Administrative Procedure Act (Gov. Code, §§ 11465.10-11465.70) do not apply. Gov. Code Section 13910 also states that the executive officer, or his or her designee, shall keep a full and true record of all proceedings of the board, issue all necessary process, writs, warrants, and notices, and perform those other duties as the board prescribes. The executive officer and the deputy executive officers, or their designees may

		administer oaths, certify to all official acts, and issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and testimony in any inquiry, investigation, hearing, or proceeding in any part of the state. Since the Board is exempt from the formal provisions of the APA (Gov. Code, §§ 11500-11529), Gov. Code, section 11450.20(a) does not mandate the issuance of subpoenas. Also, a mandate that Board issue subpoenas is ill-advised because the Board lacks the authority to timely enforce an administrative subpoena. Cal. Code Reg., tit. 2, section 618.3 states that the Board or hearing officer may, in regards sanctions for failure to obey a lawful Board order, certify the facts that justify a contempt sanction to the superior court in the county where the hearing is held. The person being sanctioned must be noticed of the action, and only then is the matter scheduled for hearing in the superior court .
§ 644	Section 644 (g) "A party that requests that all or part of a hearing be conducted by electronic means other than telephone under California Code of Regulations section 617.4 ~~shall~~ <u>may</u> be responsible for providing, operating, and paying for all necessary equipment." At present, claimants and the Attorney General are allowed to use a phone provided by the Board for witnesses who testify telephonically. The suggested provision puts the burden on those	644(g) - This section will be revised to incorporate "may" instead of "shall."

	with witnesses testifying telephonically to bring their own telephone to the hearing room. We request the language of this regulation be changed back to be consistent with that of § 617.4, "…may be responsible for providing…." In the event a party wants to conduct a video-hearing or use other non-standard equipment, this suggested provision would allow to Board to require the party to provide their own equipment. Section 644(o) [new subdivision, requiring re-lettering of proposed subdivisions o-q] "The hearing officer shall file his or her proposed decision within (x months) of the hearing date or from the date the hearing record is closed." We ask the Board to consider adding a deadline for the filing of the hearing officer's proposed decision. In one case, a decision was not handed down for approximately one year. We understand that unusual circumstances resulted in this lengthy delay; however, to make expectations clear for all involved, the best policy would be to have regulations establishing a time-frame for the decision. We ask the Board to consider adding a deadline for the filing of the hearing officer's proposed decision. In one case, a decision was not handed down for approximately one year. We understand that unusual circumstances resulted in this lengthy delay; however, to make expectations clear for all involved, the best policy would be to have regulations establishing a time-frame for the decision.	644(o) - California Penal Code sections 4900 through 4906 only require that the claimant submit his or her claim within two years of release, et al. Therefore, no time limit will be imposed on the setting of a hearing date or to place a time constraint on the production of a proposed decision.
§ 645	None	N/A